

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MICHAEL AND VANIA FORTUNE</b>	:	DETERMINATION
	:	DTA NO. 820209
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the Administrative Code of the City of New York	:	
for the Year 2000.	:	

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Petitioners, Michael and Vania Fortune, 1375 East 56<sup>th</sup> Street, Brooklyn, New York 11234, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2000.

On February 4, 2005, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to it on the ground that there is no material issue of fact and that the facts mandate a determination in its favor. Petitioners' response was due March 7, 2005, which started the 90-day period for issuing this determination. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel). Petitioners, appearing *pro se*, did not file a response to the motion. Based upon the pleadings and motion papers Arthur S. Bray, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioners did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of deficiency.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioners, Michael and Vania Fortune, a Notice of Deficiency, dated March 1, 2004. The notice was addressed to petitioners at “1375 E 56 ST 2, Brooklyn, NY 11234-3331” and bore assessment identification number L-022780429-3 and certified control number 7104 1002 9730 0398 2866. The notice asserted a deficiency of personal income tax in the amount of \$1,274.00, plus interest, for a total amount due of \$1,342.80.

2. Petitioners mailed a Request for Conciliation Conference, dated July 13, 2004, to the Bureau of Conciliation and Mediation Services (“BCMS”). The envelope delivering the request was postmarked July 15, 2004 by the United States Postal Service and was received by BCMS on July 19, 2004.

3. On August 6, 2004, BCMS issued a Conciliation Order Dismissing Request to petitioners. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on March 1, 2004, but the request was not mailed until July 15, 2004, or in excess of 90 days, the request is late filed.

4. In support of its motion to dismiss, the Division submitted the affidavits of Bruce Peltier and Geraldine Mahon. The Division also submitted a copy of the subject Notice of

Deficiency, a copy of the certified mail record (“CMR”) containing a list of the notices allegedly issued by the Division on March 2, 2004 and a copy of petitioners’ 2002 New York income tax return.

5. Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a CMR. The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit. CARTS also generates a Mailing Cover Sheet with the corresponding certified number for each notice. The Mailing Cover Sheet contains a bar code, the taxpayer’s mailing address, the Division’s return address and taxpayer assistance information.

6. Each computer-generated notice of deficiency was predated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading “Certified No.” The CMR listed an initial date, the date of its printing, in its upper left corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date and time of

“20040491732.”<sup>1</sup> The date the notices were mailed, that is, March 2, 2004, was handwritten by personnel in the Division’s Mail Processing Center.

7. After a notice of deficiency was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer placed the statutory notice and associated documents into a windowed envelope, weighed and sealed each envelope, affixed postage and placed fee amounts thereon. A Mail Processing Center clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark and his initials to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control unit.

9. In the instant case, the CMR was a 10-page, fan-folded (connected) computer-generated document entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE.” All pages were connected when the postmarked document was returned after mailing. This CMR lists 102 control numbers. Each such certified control number was assigned to an item of mail listed on the 10 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number and the name and address of the addressee.

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<sup>1</sup> This number signifies the date and time the CMR was produced by year, Julian day of the year and military time of the day.

10. Information regarding the Notice of Deficiency issued to petitioners was contained on page six of the CMR. Corresponding to certified control number 7104 1002 9730 0398 2866 was notice number L 022780429, along with Mr. Fortune's name and an address, which was identical to that listed on the subject Notice of Deficiency.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated March 2, 2002, and the initials of the postal employee, verifying receipt of the items.

12. The last page of the CMR, page 10, contained a printed entry of "102" corresponding to the statement "Total Pieces and Amounts Listed." The number "102" is also handwritten at the bottom of the page. The postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee also appear at the bottom of the page.

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and handwriting the "102" indicates that all 102 pieces listed on the CMR were received at the post office.

14. The fact that the Postal Service employee wrote the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Bruce Peltier. The basis of Mr. Peltier's knowledge of this fact is that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

15. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “5” through “15” were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

17. Petitioners’ New York State Resident Income Tax Return for 2002 listed their address as “1375 E 56 ST 2, Brooklyn NY 11234-3331.” The return was dated February 3, 2003. Similarly, petitioners wrote 1375 E 56 St., Brooklyn, N.Y. 11234 on the Request for Conciliation Conference on the separate lines for their current address and the address on the notice. Lastly, the same address appears on the petition filed with the Division of Tax Appeals.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Petitioners did not reply to the Division’s motion for summary determination.

Consequently, they are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Matter of Dooley*, Tax Appeals Tribunal, March 21, 2002). However, the evidence must be viewed in a manner most favorable to the party opposing the motion (*id*).

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” Petitioners do not contend that the Notice of Deficiency was sent to an incorrect address. The evidence in this record shows that the address listed on the Notice of Deficiency was the address which was provided by petitioners on the tax return filed for the year at issue.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency or, in the alternative, may file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days of the mailing of the Notice of Deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). The filing of a petition or a request for a conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 2, 1996).

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. In the present matter, the affidavits of the two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and Bruce Peltier (Mail and Supply Supervisor in the Division's Registry Unit) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of deficiency. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the Notice of Deficiency and the certified mail record submitted by the Division as evidence of actual mailing of the notice to petitioners. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Peltier were followed with respect to the notice at issue in this matter.

G. Petitioner Michael Fortune's name and address appear on page six of the CMR which bears a USPS postmark of March 2, 2004. There are 102 certified control numbers listed on the 10 pages of the CMR. There were no deletions. Therefore, the total number of items for mailing was 102 and the USPS employee who initialed the CMR on the last page thereof indicated that he or she received 102 items for mailing. The Notice of Deficiency contained the same certified control number (7104 1002 9730 0398 2866) as was set forth on the CMR. The Division has, therefore, established that it mailed the Notice of Deficiency to petitioners, by certified mail, on March 2, 2004. The 90-day period is measured from the date of mailing and the 90-day period for filing a petition or request for a conciliation conference expired on May 31, 2002. It is clear, therefore, that petitioners' request was untimely and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioners' case. Nevertheless, petitioners may obtain review of their position by paying the tax and filing a claim for a refund within the prescribed period (Tax Law § 687[a]).



H. The motion by the Division of Taxation for an order dismissing the petition of Michael Fortune and Vania Fortune and granting summary determination to the Division of Taxation is granted.

DATED: Troy, New York  
April 28, 2005

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE